

WHEN RECORDED, RETURN TO:

City of Tempe Basket

**FOOTING EASEMENT AGREEMENT
(ASU 7th Street/College Avenue Encroachments)**

THIS EASEMENT AGREEMENT (ASU 7th Street/College Avenue Encroachments) (“**Easement**”) is entered into as of the ____ day of _____, 2013, by and between the CITY OF TEMPE, an Arizona municipal corporation (“**Grantor**”), and the ARIZONA BOARD OF REGENTS, a body corporate acting for and on behalf of Arizona State University (“**Grantee**”).

RECITALS:

A. Grantee owns certain land more particularly described in **Exhibit A** attached hereto and made a part hereof (the “**Grantee’s Property**”).

B. Grantor owns certain land adjacent to the Grantee’s Property, more particularly described in **Exhibit B** attached hereto and made a part hereof (the “**Grantor’s Property**”).

C. Grantor desires to grant to Grantee, and Grantee desires to receive from Grantor, an easement for the construction of certain encroachments consisting of building footings and overhangs described in the plans to be prepared and submitted by Grantee pursuant to **Section 3(a)** hereof (the “**Encroachments**”) on Grantor’s Property in a location more particularly shown in **Exhibit C** attached hereto and made a part hereof (the “**Easement Area**”), and for access to and from the Easement Area.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged, Grantor and Grantee hereby agree as follows:

1. Grant of Easement; Restrictions.

a. Grant; Reservations. Grantor does hereby grant and convey to Grantee and Grantee’s agents, contractors, invitees, employees, representatives, successors and assigns (collectively, the “**Grantee Parties**”), (a) a non-exclusive right and easement to construct and maintain the Encroachments within the Easement Area, and (b) a non-exclusive right and easement over the Grantor’s Property for the purpose of constructing the Encroachments within the Grantee’s Property and the Easement Area during construction.

Grantee shall exercise its rights hereunder in a manner so as not to damage Grantor’s Property or any property that may at any time be thereon, and Grantee shall promptly repair any damage caused by Grantee or its agents, employees, or contractors, and in the event of any such damage, shall restore Grantor’s Property or any property located thereon to substantially the same

condition which existed immediately prior to the performance of any work thereon by or on behalf of the Grantee.

Grantor reserves the right to use, occupy, and improve the Easement Area for any and all purposes not inconsistent with the rights granted herein.

b. Encumbrances. This Easement is granted without representation or warranty and subject to all existing encumbrances of record, including easements and licenses to which the Easement Area is subject. It shall be Grantee's obligation and responsibility to ascertain the rights of all third parties. Nothing in this Easement shall be construed as Grantor's representation, warranty, approval or consent regarding rights held by other parties; provided, however, that if approval or consent of any third party shall be required, Grantor agrees to cooperate with Grantee, at no cost to Grantor, in obtaining such consent. Grantee shall be responsible for any liability arising out of any dispute or claim regarding actual or alleged interests of third parties in the Easement Area, affecting Grantee's interests created herein.

2. Indemnification and Insurance.

a. Grantee agrees to indemnify and hold harmless Grantor from and against any and all claims, losses, liability, costs or expenses (including reasonable attorneys' fees) (hereinafter collectively referred to as "**claims**") arising out of bodily injury of any person (including death) or property damage, but only to the extent that such claims which result in vicarious/derivative liability to Grantor are caused by the act, omission, negligence, misconduct or other fault of Grantee, its officers, officials, agents or employees.

b. Any other provision of this Easement to the contrary notwithstanding, the parties acknowledge that Grantee is a public institution and any indemnification or hold harmless provision provided by it is limited as required by State law, including without limitation Article 9, Sections 5 and/or 7 of the Arizona Constitution and Arizona Revised Statutes ("**A.R.S.**") §§ 35-154 and 41-621. Grantee's liability under any claim for indemnification is limited to claims for property damage, personal injury, death, or copyright or patent infringement damages caused by acts or omissions of Arizona State University employees.

c. Grantee, its officers, agents and employees are covered against liability through the State of Arizona Department of Administration Risk Management Division's program of self insurance for acts or omissions while acting in authorized government or proprietary capacities and in the course and scope of employment or authorization (the "**Liability Coverage**"). The Liability Coverage is provided in accordance with and subject to the provisions of A.R.S. § 41-621. A master certificate of insurance evidencing such insurance is on file with Grantor. Liability coverage provided by Grantee shall be primary and noncontributing to any coverage maintained by or on behalf of Grantor. If any portion of the Easement Area is hereafter to be used for service and consumption of alcohol, additional coverage shall be provided for liquor liability in the minimum amount of \$2,000,000.00 per occurrence, and prior to the date Grantee commences to serve or allow consumption of alcohol within the Easement Area, Grantee shall provide Grantor with a certificate reflecting that such coverage is in effect.

3. Construction and Maintenance of Encroachments.

a. Grantee shall diligently undertake to develop plans and specifications for the construction of the Encroachments, and shall submit same to City for approval in accordance with City's usual procedures for right-of-way permits (but excluding building permits). Once approved by the City, Grantee shall not make any changes to the approved plans and specifications without the prior written consent of City.

b. Grantee shall construct the Encroachments in accordance with the approved plans and specifications at its own cost and expense. Within sixty (60) days after construction of the Encroachments is completed, Grantee shall provide City with an as-built survey or other certified document showing the exact location, size and dimensions of the Encroachments.

c. All construction shall be performed pursuant to, and consistent with, all applicable state and local laws and regulations, including without limitation A.R.S. Title 34 and all current building safety requirements. The Encroachments will form an integral part of a building being constructed on Grantee's Property, the construction of which will be conducted under the auspices of the Arizona Board of Regents. Accordingly, Grantee assumes all risks, liability and responsibility for construction activities regarding the Encroachments on or within the Easement Area. City hereby disclaims any responsibility for such construction activities regardless of the fact that they will be conducted in the public right-of-way.

d. City shall have the right to enter the Easement Area during construction to verify compliance with all applicable laws and the provisions of this Easement. Grantee shall provide security for the construction site at its own expense, and shall be responsible for any vandalism, theft or criminal damage to the Encroachments or to any other facilities existing on the Grantor Property during construction.

e. At least ten (10) days prior to the beginning of any construction on the Easement Area, Grantee shall give Grantor written notice of the date that construction will begin and a schedule listing all material construction activities and the dates when such construction activities will be performed. Grantee shall give Grantor written notice of all changes in the schedule and delays in construction promptly upon it being reasonably foreseeable that such change or delay will occur. Grantor may request that Grantee adjust the construction schedule if and to the extent necessary to prevent any material interference with Grantor's use of the Grantor Property.

f. Prior to commencing construction, Grantee shall have the Easement Area surveyed or blue staked to determine the exact location of any underground utilities or other facilities. Grantee shall at its sole cost and expense relocate any underground utilities or other facilities as necessary to facilitate construction of the Encroachments, including without limitation any and all elements requiring relocation as noted on the approved plans or discovered during the plan review process. Grantee also shall at its sole cost and expense modify, build, rebuild, reconstruct or relocate any sidewalks, streetlights and public roads damaged or requiring relocation or modification to accommodate construction of the Encroachments to current City of Tempe standards. The foregoing work shall be included in the plans submitted for City review

and approval. Grantee acknowledges that the Grantor Property must continue to serve the primary functions of providing public access after construction of the Encroachments, and that Grantee shall be responsible for taking all reasonable steps required by City to ensure such continued functionality.

g. Grantee shall not permit any liens to attach to the Grantor Property as a result of the acts or omission of any of the Grantee Parties, and if any such liens do attach, Grantee shall promptly (and in any event within 30 days after receiving notice thereof) cause them to be released or bonded by paying the indebtedness which gave rise to such lien, or by posting bond or other security as shall be required by law to obtain such release and discharge; provided, however, that Grantee shall also have the right to contest any such lien.

h. Grantee shall use the Easement Area only for supporting or housing the Encroachments or allowing them to occupy the airspace included within the Easement Area, and for no other purpose whatsoever. Grantee shall not construct or create any encroachments or facilities other than those defined as Encroachments in, on or about the Easement Area or the Grantor Property. Once constructed, Grantee shall not make any material alternation, improvement, addition or other installation to the Encroachments without Grantor's prior written consent, and provision of plans for of the proposed alteration, improvement, addition or installation.

i. Grantee shall at all times, at its sole cost and expense, keep and maintain in good, sanitary and safe condition and in substantial repair the Encroachments, and all other improvements of any kind erected, installed or made on or within the Easement Area by Grantee. If some or all of the Encroachments are damaged or destroyed, partially or totally from any cause whatsoever, whether or not such damage or destruction is covered by insurance, Grantee shall repair, restore and rebuild the Encroachments and the Easement Area to their condition existing immediately prior to such damage or destruction. Such repair, restoration and rebuilding shall be commenced within a reasonable time after such damage or destruction has occurred and shall be diligently pursued to completion.

j. Grantee shall not commit or permit any nuisance or other act, whether noise, odor, smoke, sewage, chemical wastes, or otherwise to exist on the Easement Area as a result of any act or omission by Grantee. Grantee shall not obstruct or cause to be obstructed any public or private sidewalks or roadways located adjacent to the Easement Area, except for temporary periods necessary to complete the construction of the Encroachments in accordance with the traffic control plan approved by City in connection with such construction.

4. Covenants Running With the Land. The terms, conditions and rights contained herein shall be covenants running with the land and shall be perpetual for so long as the Encroachments are used by Grantee for the stated purpose. This Easement shall be recorded against Grantor's Property, and the terms and conditions contained herein shall bind, inure to the benefit of, and be enforceable by, Grantor, Grantee and their respective successors and assigns (including, without limitation, any and all successors to Grantor in title to Grantor's Property).

5. Notices. All notices or other communications required or permitted to be provided pursuant to this Easement shall be in writing and shall be hand delivered, sent by

United States Postal Service, postage prepaid, by a nationally recognized courier service. All notices shall be deemed to have been given when delivered if hand delivered, when received if sent by courier, or forty-eight (48) hours following deposit in the United States Postal Service. Notices shall be addressed as follows:

If to Grantor:	City Manager City of Tempe 31 East Fifth Street Tempe, AZ 85251 Fax: 480-350-8930
With copy to:	City Attorney City of Tempe 21 East Sixth Street Tempe AZ 85251 Fax: 480-350-8645
If to Grantee:	University Real Estate Development P.O. Box 873908 Tempe, Arizona 85287-3908 Attention: Steven L. Nielsen Facsimile: (480) 727-6210
With a copy to:	Office of General Counsel P.O. Box 877405 Tempe, Arizona 85287-7405 Attention: General Counsel Facsimile: (480) 965-0984

or at such other addresses as any party, by written notice in the manner specified above to the other party hereto, may designate from time to time. Any notice to be given by any party hereto may be given by legal counsel for such party.

6. Severability. If any term, provision or condition in this Easement shall, to any extent, be invalid or unenforceable, the remainder of this Easement (or the application of such term, provision or condition to persons or circumstances other than in respect of which it is invalid or unenforceable) shall not be affected thereby, and each term, provision and condition of this Easement shall be valid and enforceable to the fullest extent permitted by law.

7. Governing Law; Venue. The terms and provisions of this Easement shall be governed by and construed in accordance with the laws of the State of Arizona. With respect to any suit, action or proceeding relating to this Easement (each a "**Proceeding**"), the parties hereto each irrevocably: (a) agree that any such Proceeding shall be commenced, brought, tried, litigated and consummated in the courts of the State of Arizona located in the County of Maricopa or (as applicable) the United States District Court for the District of Arizona, (b) submit to the exclusive jurisdiction of the courts of the State of Arizona located in the County of Maricopa and the United States District Court for the District of Arizona, and (c) waive any

objection which they may have at any time to the laying of venue of any Proceeding brought in any such court, waive any claim that any Proceeding brought in any such court has been brought in an inconvenient forum, and further waive the right to object, with respect to such Proceeding, that any such court does not have jurisdiction over such party.

8. Counterparts. This Easement may be executed by the parties in counterparts. Each such counterpart shall be deemed an original and all such counterparts, taken together, shall constitute one and the same agreement.

9. Captions. The section headings appearing in this Easement are for convenience of reference only and are not intended, to any extent and for any purpose, to limit or define the text of any section or subsection hereof.

10. Further Assurances. Each party agrees that it will execute and deliver such other documents and take such other action as may be reasonably requested by the other party to effectuate the purposes and intention of this Easement.

11. No Waiver. The failure of either party to enforce at any time any provision of this Easement shall not be construed to be a waiver of such provision, nor in any way to affect the validity of this Easement or any part hereof or the right of such party thereafter to enforce each and every such provision. No waiver of any breach of this Easement shall be held to constitute a waiver of any other or subsequent breach.

12. Time of the Essence. Time if of the essence of all provisions of this Easement in which time is a relevant factor.

13. General Provisions.

a. Each person executing this Easement personally represents that he or she has the full legal right to do so in the capacity indicated.

b. The parties agree to comply with all applicable state and federal laws, rules, regulations and executive orders governing equal employment opportunity, immigration, nondiscrimination, including the Americans with Disabilities Act, and affirmative action.

c. This Easement is subject to A.R.S. § 38-511. This Easement may be canceled if any person significantly involved in initiating, negotiating, securing, drafting or creating this Easement on behalf of any party is an employee, consultant, or agent of any other party to this Easement.

d. Notice is provided of A.R.S. §§ 12-1518 and 12-133.

e. To the extent required by A.R.S. § 35-214, City agrees to retain all records relating to this Easement and to make those records available at all reasonable times for inspection and audit by Licensee or the Auditor General of the State of Arizona during the term of this Easement and for a period of five (5) years after the completion of this Easement. The records shall be provided at Tempe's address stated in **Section 5**.

f. If either party's performance under this Easement depends upon the appropriation of funds by the Arizona Legislature or the Tempe City Council, and such body fails to appropriate the funds necessary for performance, then ASU or Tempe, as applicable, may, by written notice to the other, cancel this Easement without further obligation. Appropriation is a legislative act and is beyond the control of the parties. Grantee acknowledges that it has no financial obligations under this Easement and that its performance is not, therefore, dependent on the appropriation of funds by the Tempe City Council, and that it has no right to cancel this Easement pursuant to any non-appropriation of funds.

[SEE FOLLOWING PAGES FOR SIGNATURES]

IN WITNESS WHEREOF, the parties hereto have caused this Easement Agreement (Block 12 Encroachment) to be executed as of the day and year first above written.

GRANTOR

CITY OF TEMPE, a municipal corporation

By: _____

Name: _____

Title: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me on _____, 2013, by _____, the _____ of the **CITY OF TEMPE**, a municipal corporation, on behalf of the corporation.

Notary Public

[Notary Seal]

**SIGNATURE PAGE FOR EASEMENT AGREEMENT (BLOCK 12
ENCROACHMENTS), CONTINUED**

GRANTEE

**THE ARIZONA BOARD OF REGENTS, FOR
AND ON BEHALF OF, ARIZONA STATE
UNIVERSITY**

By: _____

Name: Steven L. Nielsen

Title: Assistant Vice President, University

Real Estate Development

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me on _____, 2013, by
Steven L. Nielsen, the Assistant Vice President, University Real Estate Development, of **THE
ARIZONA BOARD OF REGENTS, FOR AND ON BEHALF OF, ARIZONA STATE
UNIVERSITY**, on behalf of the University.

Notary Public

[Notary Seal]

Exhibit A
(the “Grantee’s Property”)

Exhibit B
(the “Grantor’s Property”)

Exhibit C
(the “Encroachment Easement”)